IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 15, 2006 Session

JONATHAN N. CROCKETT v. MELINDA J. HOGAN

Appeal from the Chancery Court for Robertson County
No. 16145 Laurence M. McMillan, Jr., Chancellor

No. M2005-01788-COA-R3-CV - Filed on August 14, 2007

This appeal involves the parenting plan for a nine-year-old child with Attention Deficit Hyperactivity Disorder and Tourette's Syndrome. The mother was designated the primary residential parent when the parties were divorced in 2002 in the Chancery Court for Robertson County. Six months later, the father filed a petition requesting to be designated as the primary residential parent because the mother had been charged with embezzling from her employer and because of the parties' different approaches to their son's medical conditions. Following a bench trial, the trial court determined that a material change in circumstances had occurred and that designating the father as the primary residential parent was in the child's best interests. On this appeal, the mother insists that the trial court erred by finding a material change in circumstances and by designating the father as the primary residential parent. While we have concluded that the trial court properly found that a material change in circumstances had occurred, we have determined that the record does not support the trial court's conclusion that designating the father as the primary residential parent is in the child's best interests.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

Carrie W. Gasaway, Clarksville, Tennessee, for the appellant, Melinda J. Hogan.

William R. Underhill, Springfield, Tennessee, for the appellee, Jonathan N. Crockett.

OPINION

I.

Jonathan Crockett and Melinda Crockett were divorced in July 2002 in the Chancery Court for Robertson County. Ms. Crockett was designated as the primary residential parent for their son, Logan Crockett, who was born in July 1998. Mr. Crockett received visitation every other weekend and one overnight visit each week. The parties occasionally agreed to alter this arrangement.

Logan Crockett's IQ is average to above-average in most areas. However, he has been diagnosed with moderate Attention Deficit Hyperactivity Disorder and moderate to severe Tourette's Syndrome. These conditions have decreased his attention span, affected his fine motor skills, and caused him to experience facial and body ticks. Because the prescribed medications produced undesirable side effects, Ms. Crockett decided to replace them with herbal remedies. Logan Crockett's elementary school has made appropriate accommodations for him, and he is doing well in school by all accounts.

Mr. Crockett and Ms. Crockett disagreed frequently regarding the proper approach to their son's developmental challenges. Mr. Crockett insists that Ms. Crockett is overprotective. For her part, Ms. Crockett believes that Mr. Crockett tends to deny the existence of her son's conditions and the effects they have on him.

In October 2002, Ms. Hogan was arrested for embezzling funds from her employer. She lost her job and was charged with theft of property over $10,000. After Ms. Crockett was released on bail, the parties continued to abide by the parenting plan approved in the July 2002 divorce decree.

Mr. Crockett, reacting primarily to Ms. Crockett's arrest, filed a petition in January 2003 seeking to be designated primary residential parent.[1] Ms. Crockett married Eric Hogan in February 2003 and thereafter filed a counter-petition requesting the trial court to eliminate Mr. Crockett's overnight visitation during the week.[2] Mr. Crockett remarried in March 2003. Three months later, in June 2003, Ms. Hogan became employed by ServPro Industries in Gallatin. In August 2003, the parties' efforts to mediate their differences proved unsuccessful.

Mr. Crockett divorced his second wife in April 2004 and married his third wife four months later. In March 2005, Ms. Hogan informed Mr. Crockett that she had been researching educational opportunities for their son in the neighboring counties and that she and her husband planned to move if they found a better curriculum. They eventually decided to move to Sumner County to be closer to their families.[3]

The trial court conducted a two-day bench trial in May 2005. Mr. Crockett, Ms. Hogan, and their current spouses testified. The chief disagreements involved the proper extent of Ms. Hogan's involvement with Logan Crockett's education. Ms. Hogan considered herself their son's only advocate; while Mr. Crockett insisted that the child should be treated more like a child without any disabilities. Among other witnesses presented were the child's first grade teacher and his school psychologist, both of whom testified that the child was essentially a thriving, happy child who generally performs well in school.

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[1] Mr. Crockett also requested other relief with regard to several financial issues lingering from the parties' divorce. These issues are not before this court in this proceeding.

[2] Ms. Crockett changed her surname to Hogan after her marriage, and we will refer to her as Ms. Hogan for the remainder of the opinion.

[3] At the time of trial, Ms. Hogan had placed her house on the market and intended to move upon its sale. The record does not indicate whether the move has taken place.

On June 27, 2005, the trial court filed a memorandum opinion concluding that Ms. Hogan's criminal prosecution, the inability of the parties to cooperate with regard to their son, and Ms. Hogan's planned move to Sumner County constituted material changes in circumstances warranting a modification in the existing parenting plan. The court also concluded that Ms. Hogan's criminal conviction rendered her entire testimony "not creditable." Accordingly, the trial court decided that Mr. Crockett should become Logan Crockett's primary residential parent and that Ms. Hogan should have visitation with the child for three weekends each month. The trial court also decided that Mr. Crockett should have sole authority to make educational decisions on behalf of the parties' son. The court entered a final order on July 21, 2005. On this appeal, Ms. Hogan asserts that the trial court erred by determining that a material change in circumstances had occurred and that it is in Logan Crockett's best interests to modify the original parenting plan.

II.

The sole issue presented by this appeal is whether the evidence supports the trial court's decision to modify the parenting plan by designating Mr. Crockett as Logan Crockett's primary residential parent. Prescribing a child's residential arrangements are among the most important decisions that courts make. *In re Zaylen R.,* No. M2003-00367-COA-R3-JV, 2005 WL 2384703, at *3 (Tenn. Ct. App. Sept. 27, 2005) (No Tenn. R. App. P. 11 application filed); *Steen v. Steen*, 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001); *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 484 (Tenn. Ct. App. 1997). The chief purpose of the parenting plan is to promote the child's welfare by creating an environment that promotes a nurturing relationship with both parents. *Aaby v. Strange*, 924 S.W.2d 623, 629 (Tenn. 1996); *Shofner v. Shofner*, 181 S.W.3d 703, 715 (Tenn. Ct. App. 2004).

The party seeking to change an existing custody arrangement has the burden of demonstrating both that the child's circumstances have changed materially and that the best interests of the child require a change in the existing custody arrangement. *Curtis v. Hill*, 215 S.W.3d 836, 840 (Tenn. Ct. App. 2006); *In re Bridges*, 63 S.W.3d 346, 348 (Tenn. Ct. App. 2001). The threshold question is whether there has been a material change in the child's circumstances. *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002); *Blair v. Badenhope*, 77 S.W.3d 137, 150 (Tenn. 2002). If the party seeking the change of custody cannot demonstrate that the child's circumstances have changed in some material way, the trial court should not re-examine the comparative fitness of the parents, *Caudill v. Foley*, 21 S.W.3d 203, 213 (Tenn. Ct. App. 1999), or engage in a "best interests of the child" analysis. Rather, in the absence of proof of a material change in the child's circumstances, the trial court should simply decline to change custody. *Hoalcraft v. Smithson*, 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999).

The determinations of whether a material change in circumstances has occurred and where the best interests of the children lie are factual questions. *Turner v. Purvis*, No. M2002-00023-COA-R3-CV, 2003 WL 1826223, at *4 (Tenn. Ct. App. Apr. 9, 2003) (No Tenn. R. App. P. 11 application filed); *see also Adelsperger v. Adelsperger*, 970 S.W.2d 482 at 485. While the trial court's conclusions of law are reviewed under a pure de novo standard, with no deference accorded, we review a trial court's findings of fact with a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Kendrick v. Shoemake*, 90 S.W.3d at 569-70;

Brooks v. Brooks, 992 S.W.2d 403, 404 (Tenn. 1999). Where the trial court makes no specific findings of fact, we must review the record to determine where the preponderance of the evidence lies. *Kendrick v. Shoemake*, 90 S.W.3d at 570; *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

Because of the discretion given trial courts in this area and because of the fact-specific nature of these decisions, appellate courts are reluctant to second-guess a trial court's determination regarding custody and visitation. *Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001); *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996). Accordingly, courts will decline to disturb the parenting plan fashioned by a trial court unless that decision is based on a material error of law or the evidence preponderates against it. *Adelsperger v. Adelsperger*, 970 S.W.2d at 485. Similarly, a trial court's decision regarding visitation should be set aside only when it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001).

Tenn. Code Ann. § 36-6-101(a)(2)(C) (Supp. 2006) sets a very low threshold for establishing a material change in circumstances. *Boyer v. Heimermann*, No. M2006-01566-COA-R3-CV, 2007 WL 969408, at *6 (Tenn. Ct. App. Mar. 30, 2007) *perm. app. filed* (Tenn. May 29, 2007); *Rose v. Lashlee,* No. M2005-00361-COA-R3-CV, 2006 WL 2390980, at *2 n.3 (Tenn. Ct. App. Aug. 18, 2006) (No Tenn. R. App. P. 11 application filed). While there are no bright-line rules for determining whether a material change in circumstances has occurred, the Tennessee Supreme Court has pointed out that several of the factors that courts should consider include: (1) whether the change occurred before or after the entry of the order sought to be modified, (2) whether the change was not known or reasonably anticipated when the order was entered,[4] and (3) whether the change affects the child's well-being in a meaningful way. *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn. 2003); *Kendrick v. Shoemake*, 90 S.W.3d at 570; *Blair v. Badenhope*, 77 S.W.3d at 150.

Not every change in the circumstances of either a child or a parent will qualify as a material change in circumstances. The change must be "significant" before it will be considered material. However, evidence showing that an existing arrangement has proven unworkable for the parties may be sufficient to satisfy the material change in circumstances test. *Boyer v. Heimermann*, 2007 WL 969408, at *6; *Rose v. Lashlee,* 2006 WL 2390980, at *2 n.3; *Rushing v. Rushing*, No. W2003-01413-COA-R3-CV, 2004 WL 249409, at *6 (Tenn. Ct. App. Oct. 27, 2004) (No Tenn. R. App. P. 11 application filed); *Vaccarella v. Vaccarella*, 49 S.W.3d 307, 315-16 (Tenn. Ct. App. 2001).

In this case, as in others, the fact that both Mr. Crockett and Ms. Hogan sought a modification of the existing parenting plan lends credence to the idea that the initial plan was unworkable for them. In addition, it is difficult to argue that Ms. Hogan's criminal conviction and the parties' disagreements regarding the proper approach to their son's developmental challenges do not amount to material changes in circumstances. However, the inquiry cannot end with a finding that a material change in circumstances has occurred. We must still examine the trial court's determination that the

[4]The fact that a circumstance might have been foreseeable when the decree sought to be modified was entered does not, by itself, prevent a finding of change in circumstances. Tenn. Code Ann. § 36-6-101(a)(2)(C); *Boyer v. Heimermann*, 2007 WL 969408, at *5.

child's best interests require a modification of the existing plan. Tenn. Code Ann. § 36-6-106(a) (2005); *In re Bridges*, 63 S.W.3d at 348.

The record in this case simply does not support the trial court's conclusion that changing the parenting plan approved in the July 2002 order is in Logan Crockett's best interests. To the contrary, the evidence shows that the child has progressed and thrived despite the many changed circumstances he has encountered – his father's two remarriages and six different residences, his mother's remarriage and the birth of a half-sister, his entry into first grade, and the ongoing disagreements between his parents. According to the record, the only times that he has been made aware of his mother's legal troubles have been direct results of his father's actions. The evidence presented at trial demonstrates that the child has remained happy and well-adjusted under the original parenting plan. Indeed, his first grade teacher testified that the child's attitude and performance at school are largely unvarying; the only way to tell with whom the child happens to be spending the night is by looking at which lunchbox he carries. Doubtless, the parties are in great disagreement about the proper manner to approach their child's learning and developmental needs, but Mr. Crockett has not met his burden of proving that his child's best interests compel the court to fashion a new parenting plan.

We also point out that, in addition to his assertions that Ms. Hogan is overprotective of her son, Mr. Crockett has presented two concerns throughout this case (1) that Ms. Hogan could violate the terms of her diversion and be placed in jail, and (2) that Ms. Hogan is contemplating moving out of the county. At this time, neither of these hypothetical situations rises to the level of material changes in circumstance. If Ms. Hogan is reincarcerated, or if she does move, then Mr. Crockett is free to seek a modification based upon those circumstances, provided he meets the applicable burden of proof.

III.

We reverse the July 21, 2005 order designating Mr. Crockett as the primary residential parent and remand the case to the trial court for whatever further proceedings consistent with this opinion may be required. We tax the costs of this appeal in equal proportions to Melinda J. Hogan and her surety and to Jonathan N. Crockett for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.